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No. 99-630

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IN THE

# Supreme Court of the United States

PATRICIA J. MATASSARIN,

*Petitioner,*

*v.*

F.F. MIKE LYNCH, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

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## STATEMENT PURSUANT TO RULE 29.6

Respondent, Broadcast Group Kansas, Inc., formerly known as Great Empire Broadcasting, Inc., is wholly owned by Journal Broadcast Corporation which is wholly owned by Journal Communications, Inc.

Respondent, Menke & Associates, Inc., has no parent corporation and no publicly held company owns more than 10% of its stock.

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## I. STATEMENT OF THE CASE

In Matassarin's Statement of the Case, Matassarin provides a description of the case that includes substantial inaccuracies. In general terms, Defendants/Respondents note the following incorrect statements made by Matassarin:

On page 3 of Matassarin's Petition for Writ of Certiorari (the "Petition"), Matassarin implies that the Court of Appeals concluded that the Plan Administrator mandated the language of the QDRO. While the Plan Administrator did provide a format for the QDRO, the Administrator did not mandate the format or content. The Court of Appeals noted only that the Administrator "suggested the terms of the QDRO." *See* Matassarin's Appendix at p.4a.

On pages 3-4 of the Petition, Matassarin concludes that her stock and the stock of 67 terminated participants was taken from their accounts and placed in a suspense account for purchase by active participants, including fiduciary defendants. In fact, neither Matassarin nor the other participants ever had any "stock" that was taken from them. Rather, pursuant to the terms of the QDRO, Matassarin had an interest in 520.086 shares that was segregated into an account earning interest at the rate paid on one-year certificates of deposit. Pursuant to the terms of the plan, which required accounts to be segregated into interest bearing accounts following termination of employment, the interests of the 67 other participants were also segregated into interest bearing accounts. While Matassarin complains that her interest was valued at the date of segregation, rather than at the date of distribution, the QDRO provided that Matassarin's interest in the Plan was to be segregated into a cash value, which would then accumulate interest. In order to segregate

the cash value, the valuation of the stock immediately preceding the segregation was considered. The Court of Appeals concluded that the Plan Administrator's segregation of Matassarin's interest, and the valuation of same, was legally correct. *See* Matassarin's Appendix at p.19a. Matassarin's assertions to the effect that Plan fiduciaries then purchased the "stock" at greatly reduced prices is unsupported by the record.

On page 4 of the Petition, Matassarin complains that her interest is relegated to accumulating simple interest for twenty four years. In fact, pursuant to § 18(e)(4) of the Plan, Matassarin could be entitled to distribution before twenty four years — *i.e.*, when Jenkins (her ex-husband) reaches Earliest Retirement Age, which is defined as the earlier of: (1) the date on which Jenkins was entitled to a distribution under the Plan, or (2) the later of the date on which Jenkins turned age 50, or the earliest date on which Jenkins would begin receiving benefit if he separated from service.

On page 4 of the Petition, Matassarin states that Defendants failed to offer her a distribution in the form of stock. However, the record reflects that on December 15, 1994, Defendant Oatman *did* send to Matassarin a letter specifically providing the option for distribution of plan benefits in the form of stock. While Matassarin denied having received this correspondence, there was no evidence on the record that the correspondence was not mailed to her.

## II. CONSIDERATIONS GOVERNING REVIEW

Review by this Court is not warranted for the following reasons:

**A. Despite Matassarin's assertions to the contrary, the Fifth Circuit Court of Appeals' reasoning does not violate: this Court's anti-alienation or public policy pronouncements, the investment diversification and fiduciary responsibility requirements, or the accrual and vesting provisions relating to defined contribution plans.**

**B. There is no conflict between the Circuits with respect to preemption.**

In Matassarin's Petition, she asserts that there are considerable differences among the Circuits with respect to preemption. On appeal to the Fifth Circuit, Matassarin argued that the QDRO should not be enforced because the order was unfairly drafted and because she did not realize its implications. Matassarin's Appendix at p.26a. With respect to that claim, the Court of Appeals concluded as follows:

> Federal courts may be called upon to determine the proper beneficiary under a QDRO or to review a plan administrator's interpretation of a QDRO, as we have done here. But although we read § 1144(a)'s "relates to" language broadly, . . . we cannot say that a federal court's role extends as far as examining the circumstances under which a potential beneficiary entered and a state court approved a QDRO. Such a claim affects domestic relations, which is not an area of exclusive federal

> concern. If Matassarin believes that she mistakenly entered the QDRO or was fraudulently induced to do so, then the Kansas state court that approved that order is the entity to hear her complaints.

Matassarin's Appendix at p.26a-27a. Matassarin claims that this holding contradicts the Sixth Circuit's decision in *Smith v. Provident Bank*, 170 F.3d 609, 615 (6th Cir. 1999) and the Fourth Circuit's decision in *Fox v Fox*, 167 F.3d 880, 883 (4th Cir. 1999). Contrary to Matassarin's argument, these opinions do not conflict with that of the Fifth Circuit.

In *Fox*, the Fourth Circuit did not address alleged fraud in the *creation* of the domestic relations order. Rather, the opinion addressed a plan administrator's determination that a domestic relations order, which had been properly created, was not "qualified" under 29 U.S.C. § 1056(d)(3)(D). *Fox*, 167 F.3d at 882-83. The Fourth Circuit concluded that while the administrator had discretion to interpret the terms of the domestic relations order, the administrator abused that discretion in construing the meaning of an ambiguous plan term. *Id.* at 883. This conclusion fits squarely within the Fifth Circuit's holding, which explicitly recognized that "[f]ederal courts may be called upon . . . to review a plan administrator's interpretation of a QDRO." Matassarin's Appendix at p.26a.

Matassarin also mischaracterizes the holding of the Sixth Circuit in *Smith*. In *Smith*, the Sixth Circuit held that claims for breach of fiduciary duty cannot be labeled as "state law" claims in an effort to obtain redress that would not otherwise be available under ERISA. *Smith* at 615. Like the decision in *Fox*, the *Smith* opinion did not involve any allegation of alleged fraud in the creation of a domestic relations order.

The Sixth Circuit's opinion in *Smith* simply does not touch upon the Fifth Circuit's conclusion that the state court has jurisdiction to determine the form and content of domestic relations orders.

The Fifth Circuit's conclusion that claims alleging fraud in the creation of a domestic relations order should be addressed in state court is in line with the decisions of other courts of appeal, which have uniformly held that ERISA does not preempt the terms of qualified domestic relations orders. *See, e.g., Metropolitan Life Ins. Co. v. Marsh*, 119 F.3d 415 (6th Cir. 1997); *Carland v. Metropolitan Life Ins. Co.*, 935 F.2d 1114 (10th Cir. 1991). Other circuits that have addressed the issue confirm that the substantive provisions of how funds are alienated within a qualified domestic relations order is the purview of the state courts and that the federal courts' obligation is limited to the determination of whether the order meets the statutory requirements of 29 U.S.C. § 1056(d) and is thus "qualified." *See Carland*, 935 F.2d at 1120; *Metropolitan Life Ins. Co. v. Fowler*, 922 F. Supp. 8, 14 (E.D. Mich. 1996); *Metropolitan Life Ins. Co. v. Wheaton*, 42 F.3d 1080, 1084 (7th Cir. 1994). Thus, Matassarin's reliance on *Smith* and *Fox* to create a conflict within the Circuits is inappropriate.

**C. There is no conflict between the Circuits with respect to whether state courts may/should determine whether a domestic relations order is to be deemed qualified under ERISA or whether Plan Administrators are the proper persons to determine the qualified status of the domestic relations order.**

In the Fifth Circuit's opinion, the court stated:

> Federal courts may be called upon to determine the proper beneficiary under a QDRO or to review a plan administrator's interpretation of a QDRO, as we have done here. *But although we read § 1144(a)'s "relates to" language broadly, . . . we cannot say that a federal court's role extends as far as examining the circumstances under which a potential beneficiary entered and a state court approved a QDRO.* Such a claim affects domestic relations, which is not an area of exclusive federal concern.

(emphasis added). Matassarin's Appendix at p.26a-27a. Matassarin apparently attempts to characterize this statement as a holding by the Fifth Circuit that state courts, rather than federal courts, have jurisdiction to determine whether a domestic relations order is "qualified." This is an erroneous reading of the Fifth Circuit's opinion. The Fifth Circuit's opinion addresses only the situation where an individual is complaining about alleged wrongdoing in the creation of a domestic relations order. The court concluded that the federal court does not have jurisdiction to consider such wrongdoing because such a claim affects domestic relations and should thus be addressed by the state courts. Matassarin's Appendix at p.26a-27a. The Fifth Circuit did *not* conclude that the

determination of qualification of a domestic relations order rests with the state courts, as Matassarin has apparently concluded.

Matassarin also complains that the Fifth Circuit's conclusion that compliance with the QDRO was obligatory is in conflict with the Third Circuit's opinion in *Samaroo v. Robichaud*. In reaching its conclusion that the plan administrator was required to follow the dictates of the QDRO, *see* Matassarin's Appendix at p.25a, the Fifth Circuit relied on *Blue v. UAL Corp.*, 160 F.3d 383 (7th Cir. 1998). In *Blue*, the Seventh Circuit held that:

> ERISA does not require, or even permit, a pension fund to look beneath the surface of the order. Compliance with a QDRO is obligatory . . . . This directive would be empty if pension plans could add to the statutory list of requirements for "qualified" status.

*Blue*, at 385. Thus, the Fifth Circuit concluded that once the plan administrator determines that a domestic relations order meets the qualifications of 29 U.S.C. § 1056(d)(3) and thus is "qualified," the administrator is required to act in accordance with the QDRO. Matassarin's Appendix at 25a. Matassarin appears to be arguing that the Third Circuit's decision in *Samaroo v. Robichaud*, __ F. 3d __, 1999 WL 744019 (3rd Cir. 1999) conflicts with that of the Fifth Circuit, inasmuch as the Third Circuit opinion does not require adherence to a domestic relations order that is not qualified. *See* Matassarin's Petition at p.9. In *Samaroo*, the Third Circuit held that the domestic relations order at issue failed to satisfy the substantive requirements of 29 U.S.C. § 1056(d)(3)(D) and was thus not a "qualified" domestic

relations order. *Id.* at *2. The Third Circuit's conclusion simply does not apply to the decision of the Fifth Circuit — *i.e.*, because Matassarin's QDRO (unlike the domestic relations order in *Samaroo*) was qualified, the administrator was bound to adhere to it. *Samaroo* does not address the situation where a "qualified" domestic relations order is at issue and simply does not affect the outcome of this case.

Similarly, Matassarin's reliance on *Nasco v. Peoplesoft*, __ F.3d __, 1999 WL 64947 (N.D. Cal. 1999) is misplaced. In *Peoplesoft*, the court noted that if a domestic relations order were not "qualified", review of the order may be proper by the federal court. Because Matassarin's QDRO *was* qualified, the *Peoplesoft* case does not apply, and the administrator was bound to follow its terms.

**D. There is no conflict between the Circuits with respect to whether a plan administrator is required to follow the provisions of a domestic relations order that meets the requirements of 29 U.S.C. § 1056.**

Matassarin also argues that the Circuits are in conflict with regard to whether a plan administrator is required to comply with a domestic relations order where compliance would violate public policy. Matassarin apparently concludes that while a domestic relations order may comply with the provisions of 29 U.S.C. § 1056, it cannot be deemed "qualified" unless the administrator also determines that the order does not violate public policy. *See* Matassarin's Petition at p.10. However, Matassarin fails to cite case law in other circuits that would support imposition of such an additional requirement. If Matassarin's argument were accepted, plan administrators would be forced not only to review orders

for compliance with the requirements of 29 U.S.C. § 1056(d)(3), but also to review orders for confirmation that the best interests of participants and alternate payees were being served. Neither the courts nor the statute impose such an onerous requirement on plan administrators, and Matassarin cites no authority in support of such an expansion.

## III. ARGUMENTS AND AUTHORITIES

Because Respondents do not believe that review of this case is cert worthy, the Respondents do not address the arguments raised by Matassarin's Petition. Should review be granted, Respondents will fully address the arguments in their briefing. Respondents rely on their briefing in the Fifth Circuit Court of Appeals with regard to the issues raised by Matassarin in the Arguments and Authorities section of her Petition.

## CONCLUSION

Respondents request that this Court deny the Petitioner's Petition for Writ of Certiorari. Respondents request all other just relief.

Respectfully submitted,

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# REPLY

# BRIEF

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*On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

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## REPLY TO BRIEF IN OPPOSITION

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## I. Reply to Defendants' Statement of the Case:

Defendants first argue that Matassarin and 67 other terminated participants did not have "stock" in Great Empire Broadcasting. (Defendants Opposition at page l.) They then contend that Defendant Oatman was correct in sending correspondence to Matassarin which specifically offered to distribute her benefit in the "form of stock". (Defendant Opposition at page 2). The Defendants arguments and reasoning have been plagued with ambiguity and uncertainty throughout, not only this litigation, but throughout their administration of the Great Empire Broadcasting Inc. Employee Stock Ownership Plan. The result has been disaster for the retirement benefits of 68 people. If the benefit derived by virtue of participation in the ESOP is not "stock", then why would the benefit be distributable in the form of "stock"?

Defendants' Brief in Opposition sheds significant light on one important error in the Fifth Circuit ruling. In their brief, on page l, Defendants say that ". . . Matassarin complains that her interest was valued at the date of segregation, rather than at the date of distribution,. . ." The Fifth Circuit found that the ESOP Plan required that the Company Stock Accounts of participants and beneficiaries be valued as of the "December 31 closely coinciding with or immediately preceding the date of actual distribution of Plan benefits". (See Appendix at page 5a) In order to mesh this Plan valuation requirement with the facts of this case, the Fifth Circuit found that "actual distribution" occurred at the time that Matassarin's benefit was "segregated" pursuant to the terms of the "Q"DRO. (See Appendix at page 19a). The segregation, however, did not result in any real form of "distribution". The Defendants' statement clearly reflects

that two separate and distinct definitions should be applied to "segregation" and "distribution". The Fifth Circuit opinion makes no distinction between the two. Significantly, Defendants do not argue that the Plan Documents support the tortured definition applied by the Fifth Circuit. Rather, they simply rely on the Domestic Relations Order as support for the treatment given Matassarin's benefit.

Defendants' contention that Matassarin's claim that the 13,000 shares of stock wrongfully taken from the Company Stock Accounts of participants were purchased by active participants (including the Defendants) at lower than market values, is "not supported by the record" is in error. The Fifth Circuit opinion summarized as follows:

> . . . the Plan administrator converted the "suspended" stock, i.e., that in the segregated accounts, to cash value for distribution, then reallocated the stock among active Plan participants. For distribution purposes, the Plan apparently valued the suspended stock by the fair market value for whichever year-end preceded the relevant employee's termination from Great Empire employment.

(See Appendix at page 5a)

**II. Reply to Defendants' Considerations Governing Review:**

Defendants argue that the Fourth Circuit ruling in *Fox v. Fox*, 167 F.3d 880 (4th Cir. 1999) does not conflict with the Fifth in *Matassarin ex rel.* They agree that the Fourth Circuit

found that the Plan Administrator abused his very broad discretion in his interpretation of an "ambiguous" Plan term. They contend, though, that the Fourth Circuit's reasoning is not at odds with the Fifth, because the Fifth Circuit also recognized that Appellate Courts have the prerogative to review the discretion afforded Plan Administrators in their interpretation of Plan provisions. The Defendants failed to address the reason that the Fourth Circuit found an abuse of discretion. An abuse of discretion was found because the Plan Administrator failed to consider the "mission" of ERISA in interpreting Plan provisions. Matassarin's complaint is not that the Fifth Circuit failed to review the discretion afforded Administrators, rather her complaint is that the Fifth Circuit upheld discretion that the Court found was "out of line from the greater goals of ERISA" concerning a "Q"DRO which was not clear and precise, but which was found by the Court to be "opaque." (See Appendix at page 18a) The terms "opaque" and "ambiguous" both connote difficulty of understanding or that which is subject to more than one meaning. The Fifth Circuit found the "mission" of ERISA(ambiguous or otherwise), while the Fourth Circuit found it to be controlling.

Defendants' further arguments against the analysis presented by Petitioner are hard to track. They say that the Fifth Circuit rightfully concluded that "the state court has jurisdiction to determine the form and content of domestic relations orders", but they also agree that the Federal Courts' obligation is the determination of whether the order meets the statutory requirements of 29 U.S.C. § 1056(d) and is thus "qualified." (See Opposition at page 5) They ambiguously argue that a State Court may determine the form and content of the Order but that Federal courts and law determine qualified status.

Federal law requires that Plan Administrators follow the provisions of ERISA. ERISA mandates that the terms of Plan documents control the activities of Plan administrators. It logically follows that a Domestic Relations Order which is in direct conflict with the specific and plain language of Plan Documents, may not be a "qualified" order.

The Amended Plan Document in this case specifically states that the Administrator is to treat Matassarin's benefit the same as Jenkins' benefit. (See Appendix at pg. 19a ) The Fifth Circuit found that failure of the Defendants to amend the Great Empire ESOP would have been a breach of fiduciary duty because it would have subjected the Plan to significant tax liability. (See Appendix at pg. 21a-22a) This Court recently opined in *Hughes Aircraft Co. v. Jacobson* 119 S.Ct. 755 (1999) :

> "ERISA gives an employer broad authority to amend a plan . . . [but] nowhere suggests that an amendment . . . creates a de facto second plan if the obligations continue to draw from the same single unsegregated pool or fund of assets."

*Id.* at 758

The Fifth Circuit opinion is in conflict with this Court because it ruled that Defendants did not have to comply with the specific provisions of the Amended ESOP Plan, a Plan which, according to Hughes, is the only Plan in existence. The Fifth Circuit opinion, in essence, finds that amendment of an ESOP Plan creates a second Plan and that administrator's may follow its terms or not follow its terms without abusing their discretion. If Amendment was

determined by the Fifth Circuit to be necessary to avoid breach of a fiduciary duty, then how is it that failure to follow the terms of the Amendment is not a breach of fiduciary duty?

This Court in *Inter-Modal Rail v. Atchison, Topeka & Santa Fe. Ry.* 117 S.Ct. 1513 (1997) found that the Amendment of an ERISA Plan is a serious event and that 29 U.S.C. § 1102(b)(3) places stringent requirements upon fiduciaries concerning the Amendment process, opining:

> Adherence to these formal procedures "increases the likelihood that proposed plan amendments, which are fairly serious events, are recognized as such and given the special consideration they deserve. [citations omitted] The formal amendment process would be undermined if §510 did not apply because employers could "informally' amend their plans one participant at a time. . . "

*Id.* at 1516

The Fifth Circuit did not treat the Amendment of the ESOP as a serious event, but rather found that the Plan Administrators had the discretion to follow the amendment or not follow it, despite the Court's finding that the Defendants' arguments in support of not following the amendment were not "self evident". (See Appendix at pg. 19a) The Defendants "informally" amended the Plan so as to provide unique treatment for Matassarin's benefit. The Fifth Circuit opinion sanctions "informal amendment" as a legitimate and reasonable exercise of administrator discretion.

**III. Reply to Defendants' Section "C".**

Defendants argue that claims concerning the circumstances under which a beneficiary entered and a state court approved a QDRO are not properly adjudicated in the Federal system, but rather are matters concerning domestic relations and are therefore relegated to State Courts. This position is in direct conflict with the position discussed above. Defendants agree that the "qualified status" of Domestic Relations Orders is a matter of Federal concern and that Federal Law should be applied in reaching that determination, while at the same time contending, as did the Fifth Circuit, that facts relating to the "form" and "content" are not matters of Federal concern. The law does not exist in a vacuum. The fact is, that the Defendants breached their fiduciary duties in demanding that an ambiguous, opaque Domestic Relations Order form be used and then abused their discretion by interpreting the opaque order in a manner which contravenes the express terms of the ESOP Plan, ERISA and the Tax Code.

It is clear from the plethora of cases addressing ERISA, that Congress intended that there be uniform law applied to pension fund benefits and that the law applied should be something that provides the same or greater protection as that provided by traditional trust law. Allowing Plan Administrators, or State Courts, to demand "opaque" Domestic Relations Orders which violate Plan provisions and the policies and "mission" of ERISA does not work to accomplish the goals that Congress, this Court and order Circuit Courts have agreed are imperative in the pension context. In essence, Defendants' argument, supported by the Fifth Circuit, is that they have the prerogative to dictate the terms of a "Q"DRO, and to determine whether it is

"qualified" and that once they say that the DRO is "qualified" then it is "qualified" and thus removed from the protections of ERISA---regardless of Federal Law. As previously cited and argued, other Circuits have taken the position that Domestic Relations Orders which operate in contravention to Federal Law are not "qualified" regardless of their status in State Courts or the offices of Plan administrators.

Significantly, the Defendants' treatment of 67 other non-Q"DRO participants is consistent with their treatment of Matassarin. The Defendants' conduct evidences a pattern of disregarded for the requirements and protections of ERISA, a pattern which padded the pockets of a select few.

Defendants were allowed to pretend that the Great Empire Broadcasting, Inc. Employee Stock Ownership Plan was an ERISA tax exempt Plan, while in practice, they treated the participants and beneficiaries which ever way they decided would best suit their own individual interests. They engaged in self dealing at the expense of participants and beneficiaries and thus breached the most elemental of fiduciary responsibilities. As of now, no recourse, is available to those who have been deprived of what is rightfully theirs.

**CONCLUSION:**

This case is "cert worthy" because the Fifth Circuit decision has, in essence, given a license to unscrupulous Administrators to disregard Plan provisions, ERISA's protections and the pronouncements of this Court and other Circuits, concerning ERISA protections and fiduciary responsibility. This case also establishes unnecessary restrictions on access to the Courts for a large population

concerning ERISA grievances and redress. Petitioner respectfully prays that this Honorable Court grant certiorari .

Respectfully Submitted:

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